

2001

Phillip Edward Miller v. G. Barton Blackstock : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PHILLIP EDWARD MILLER,	:	
	:	APPELLEE/CROSS-
Petitioner/Appellant/	:	APPELLANT'S REPLY BRIEF
Cross-Appellee,	:	
	:	
vs.	:	
	:	
G. BARTON BLACKSTOCK, Bureau		
Chief, Driver License Services, State of	:	
Utah,		
		Case No. 20010306-CA
Respondent/Appellee/		(Lower Docket 000902138)
Cross-Appellant.		Priority No. 15

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
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STATEMENT OF FACTS

The Appellee believes that the facts as stated in his opening/responsive brief are accurate.

ARGUMENT

POINT I.

**THE LOWER COURT INCORRECTLY RULED THAT
MILLER'S DUE PROCESS RIGHTS WERE VIOLATED.**

Miller asserts in his reply brief that the lower court was correct in ruling that his due process rights were violated when he was not given a temporary license by the arresting officer prior to the revocation hearing, and that in its responsive brief the Driver

License Division (hereinafter Division) incorrectly relied upon Mackey v. Montrym, 443 U.S. 1 (1979) and Dixon v. Love, 431 U.S. 105 (1977). Miller's arguments are without merit.

There is no question that driving privileges "are not to be taken away without that Due Process required by the Fourteenth Amendment." Bell v. Burson, 402 U.S. 535, 539 (1971), and as cited in Miller's brief, "[p]rocedural due process entails procedural requirements, notably notice and opportunity to be heard, which must be observed in order to have a valid proceeding affecting life, liberty, or property." In re N.H.B., 777 P.2d 487, 489 (Utah Ct. App. 1989).

The issue here is whether it was violative of Miller's due process to have his license taken away by the arresting officer without being given a temporary driver's license to use until the Division took administrative action. There is no question that Miller received notice of the Division's intent to suspend or revoke his license and pursuant to that notice, Miller asked for and received a hearing before the Division prior to the Division taking any administrative action to revoke Miller's license. And, there is no question that Miller was unable to drive, due to the arresting officer's mistake and in violation of a statute, for a period of 25 days prior to the Driver License hearing. However, this statutory violation by the arresting officer does not rise to the level of a due process violation in light of the United States Supreme Court rulings in Montrym and Love.

Unlike the instant case, the issue the Supreme Court in Montrym and Love had to resolve was whether a Massachusetts' statute and a Illinois statute were void on their face. However, the court's reasoning and conclusions are equally applicable here. The Supreme Court analyzed both cases by balancing the following three factors set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976): "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Montrym, 443 U.S. at 11.

Here, as in Montrym and Love the private interest being affected is the granted license to operate a motor vehicle, or "[m]ore particularly the driver's interest in continued possession and use of his license pending the outcome of the hearing due him." Id. "The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." Id., citing Fusari v. Steinberg, 419 U.S. 379, 389, (1975). Under the Montrym statute, a post suspension hearing is available immediately upon a driver's suspension and may be initiated by him simply by walking into one of the Registrar's local offices and requesting a hearing. Id. at 12. The Love statute did not mandate that a date be set for a post suspension hearing until 20 days after a written request for such a

hearing was received from the affected driver. Love 431 U.S. at 109-110. Here, Miller received a hearing prior to any final action taken by the Division. Prior to that hearing Miller was without a temporary license for only 25 days. As such, the duration of any potentially wrongful deprivation of Miller's property interest was no greater than in Montrym or Love.

“The second stage of the Eldridge inquiry requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used.” Montrym, 443 U.S. at 12. The “Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible “property” or “liberty” interest be so comprehensive as to preclude any possibility of error.” Id. The Supreme Court has determined that something less than an evidentiary hearing is sufficient prior to adverse administrative action. Id. at 13, *citing Love*, 431 U.S. at 113. “And, when prompt post deprivation review is available for correction of administrative error, [the Supreme Court has] generally required no more than that the pre-deprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.” Id. In this case, there was no administrative action by the Division taken prior to the deprivation hearing. However, the error by the arresting officer resulted in Miller being without his license until the deprivation hearing. In looking at the procedures used by the arresting officer in this case, and required by

statute, they are designed to provide a reasonably reliable basis for concluding that the facts justifying the action are as he warrants them to be.

Here, the arresting officer had determined that there was probable cause to arrest Miller for violation of section 41-6-44, Utah Code Annotated, he read the chemical test admonitions, including the refusal admonition, verbatim to Miller, and Miller refused to submit to the requested chemical tests. (Appellee's Responsive Brief/Cross-Appellant's Opening Brief, Addendum A at 2). The arresting officer then filed out the DUI Summons and Citation, served it upon Miller. (Appellee's Responsive Brief/Cross-Appellant's Opening Brief, Addendum A at 2). The arresting officer knew that his actions and his DUI Report would be reviewed by the Division prior to any administrative action taken by the Division to suspend or revoke Miller's license. In Miller's case, the arresting officer's actions were reviewed 25 days later and at which time the Division revoked Miller's driving privilege. As such, there were sufficient safeguards in place to insure against any erroneous deprivations.

The third factor of the Eldridge test is to identify the governmental function involved and to weigh in the balance the state interests served by the summary procedures used, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought. Eldridge, 424 U.S. at 335, Montyrm, 443 U.S. at 17. In the instant case, we are not looking a statute which authorizes summary procedures in depriving an individual of his driving privileges, but an isolated error by an arresting

officer which resulted in a temporary deprivation of Miller's driving privilege prior to an administrative hearing. Nonetheless, the paramount governmental interest here, as in Love and Montrym, is in preserving the safety of its people on the public highways. Id. at 18. In both Love and Montrym, the Supreme Court allowed summary deprivation procedures when the public's safety is at risk. Id. at 19. As such, the failure of the arresting officer to give Miller a temporary driver's license to use prior to any administrative action did not amount to a due process violation.

POINT II.

THE DISTRICT COURT CORRECTLY HELD THAT THE VIOLATION OF THE STATUTE IS NOT FATAL TO THE REVOCATION PROCESS.

Miller in his reply brief argues that the violation of section 41-6-44.10(2), Utah Code Ann. is fatal to the revocation process in light of this court's ruling in Mabus v. Blackstock, 994 P.2d 1272 (Ut. App. 1999). Miller argues that since the failure of the police officer to give Miller a temporary license is a violation of the same statute as was violated in Mabus, then the statutory violation in this case is also fatal to the revocation process. However, this argument fails to consider the reasons this court used in determining that a failure of a police officer to serve notice of the Division's intent to suspend or revoke and information on how to obtain a hearing is fatal to the revocation process.

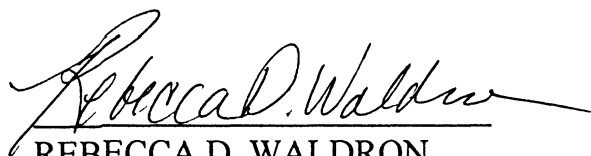
In Mabus, this court looked to what initiated the revocation process and

determined that it was service of notice and basic information pursuant to section 41-6-44.10(2), Utah Code Ann. Mabus, 994 P.2d at 1274. This court ruled that “whether denominated jurisdictional or not, service of immediate notice and basic information is essential to the validity of the subsequent proceedings for revocation.” Id. This court did not rule that failure to follow all of the requirements of section 41-6-44.10(2) was fatal to the revocation process nor should this court’s ruling in Mabus be interpreted to do so.

CONCLUSION

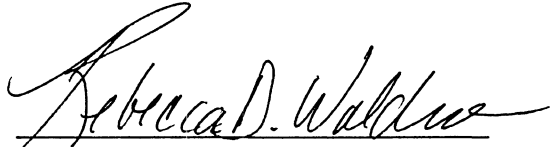
For the foregoing reasons, the Driver License Division respectfully requests that this court reverse the lower court’s ruling that a failure to comply with Utah Code Ann. § 41-6-44.10 (2)(b)(iii) is a due process violation and to modify the remedy the lower court fashioned after correctly finding a statutory violation. The Driver License Division asks this court to rule that the statutory violation did not rise to a level of a due process violation and that the appropriate remedy for the statutory violation is to make the year revocation effective the date Miller was arrested for driving under the influence and had his license taken by the arresting officer.

RESPECTFULLY SUBMITTED this 4th Day of October, 2001


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Attorney for Driver License Division

CERTIFICATE OF SERVICE

I Rebecca D. Waldron, hereby certify that on October 4, 2001, I have caused to be hand delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, Fifth floor, 140230, Salt Lake City, Utah 84114-0230 and two copies by First Class Mail to Benjamin A. Hamilton at 356 East 900 South, Salt Lake City, Utah 84111.



Rebecca D. Waldron